IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1330

ROY ISAKSON, FRED SANSONE, ROBERT BUCKNER, LARRY PAYNE, MARTIN LEAL, and GEORGE FLOOD,

Petitioners,

vs.

UNITED STATES OF AMERICA, and CITY OF CHICAGO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Justices of the Supreme Court of the United States:

Petitioners, ROY ISAKSON, FRED SANSONE, ROBERT BUCKNER, LARRY PAYNE, MARTIN LEAL, and GEORGE FLOOD, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the decision of the United States District Court for the Northern District of Illinois.

Petitioners were allowed to intervene in a suit brought by the United States seeking to declare that the Civil Service Examination for the position of patrolman in the City of Chicago was invalid on the ground that it impermissibly discriminated against minorities. Petitioners represented those persons who had taken the Civil Service Examination, passed it, and were certified on the eligibility list for the position of patrolman. They sought to have an order entered by the Court requiring that they be hired to the position of patrolman regardless of the outcome of the litigation between the United States and the City of Chicago. The District Court refused to enter an order requiring the City of Chicago to hire Petitioners in the class whom they represent. The Court of Appeals affirmed that holding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is as yet unreported, and is reproduced as Appendix A to this Petition. The opinion of the District Court is reported at 437 F. Supp. 256 and is reproduced as Appendix B to this Petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was handed down on December 14, 1977. No Petition for Rehearing was filed. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a District Court may allow a City to ignore candidates on an existing eligibility list in hiring for that Civil Service position in favor of candidates who have taken a later Civil Service Examination for the same position where proceedings of the Court have not allowed hiring to occur from the first examination.

STATEMENT OF THE CASE

On December 4, 1971, the Civil Service Commission of the City of Chicago administered an examination for the position of patrolman in the Police Department of the City of Chicago. In August, 1973, the United States filed suit attacking the examination on the basis that it impermissibly discriminated against minorities. The District Court found that the examination did discriminate as alleged and enjoined its use for further hiring on November 7, 1974. On that date, the court enjoined the City from certifying any further personnel for appointment to the rank of patrolman in the Chicago Police Department from the eligibility list until further order of the court.

On December 12, 1974, Petitioners herein filed a Petition for Leave to Intervene, which Petition was granted on February 28, 1975. Each of these petitioners had been certified on the eligibility list for hiring as a patrolman as a result of having taken and passed the 1971 examination. None of them had yet been appointed to that position. They were given leave to represent all those similarly situated.

On December 18, 1974, the District Court entered an order allowing the City to appoint 600 patrol officers, 500 from the 1971 patrolman's roster and 100 from the 1972 police woman's/matron's roster. Of those to be hired, 300 were to be black and spanish-surnamed males, 100 were to be women, and the remainder were to be "other males". At that time, only 200 of those authorized were actually hired by the City.

On March 10, 1975, the date on which the trial on the merits of the cause was to commence, the City of

Chicago announced, without prior notice to either the court or the parties, that a new examination for the position of patrol officer had been devised. That examination was administered on April 19, 1975, without advance disclosure of its contents.

On February 2, 1976, the District Court handed down its final decree. The Court found that the 1971 patrolman's examination resulted in a grossly disproportionate impact on blacks. The Court ordered that the balance of the interim hiring order be implemented.

Although finding that these petitioners had taken the 1971 examination in good faith, the Court found that "the constitution and the civil rights act dictate that in cases of this nature, the rights of the victims of discrimination be held paramount. The correlative is that the interests of the unknowing 'beneficiary' of the discrimination must be subordinated." The Court made no further provision for hiring of those on the 1971 patrolman's eligibility list, but allowed the City of Chicago to continue to hire personnel in the same ratio as set forth in the interim hiring order from these lists, "until the numbers of persons in any of the three classes (black, and spanish-surnamed males, other males, or females) available to comply with those ratios has been exhausted." Subsequent hiring was to be on the basis of 16% females, 42% black and spanish-surnamed males. The City was authorized to appoint persons from the 1971 patrolman's examination in the subsequent hiring, but was not required to do so.

After hiring those personnel from the 1971 patrolman's examination, to fulfill the interim hiring order, the City of Chicago refused to hire any further persons for the position of patrol officer from the 1971 eligibility list, although several hundred names still

remained on that list. No further persons have been hired from that list.

Only later did the City disclose the nature of the examination which was given by it for the position of patrol officer in 1975. It was disclosed that that examination resulted in persons being placed in 4 categories: well-qualified, qualified, conditionally qualified, and not qualified. All further hiring of persons for the position of patrol officer were to be taken from the list resulting from this examination.

The District Court made no finding as to the validity of this examination, as it was impossible to determine at that time whether the examination discriminated in any way against any group or groups. In subsequent proceedings, it was disclosed that the 1975 examination consisted of a comprehension test devised from excerpts of the material used during the first two weeks of training in the police academy. This examination was used solely on a pass-fail basis, to weed out those clearly unqualified for the position of patrol officer. Each candidate who successfully passed this portion of the examination was then given an oral interview by three persons, two from the Chicago Police Department, and one from the Chicago Department of Personnel. This oral examination, which lasted approximately 20 minutes, was designed to elicit the candidate's attitudes toward police work. It was solely on the basis of this oral interview that persons were placed into the well-qualified, qualified, and conditionally qualified groups.

Examples of the questions asked of the candidates included the following:

> If you were riding in a patrol car and saw 10 Arabs who did not speak English jumping on a Jew's car, what would you do?

Are you prejudiced against minorities?

Who is a worse offender, a burglar or a drug user?

What if you saw a drunk in the street who is not breathing. Would you give him mouth to mouth resuscitation, even though he was scummy and filthy and his drunken buddies were telling you that he was always drunk and not breathing?

If you were called to the home of an Irish man who was beating up his daughter because she was dating a black man, what would you do?

On September 7, 1976, the District Court rendered a memorandum opinion approving the use of the 1975 eligibility list for hiring of patrol officers by the City of Chicago and suspending the hiring ratios imposed in its final decree. The Court observed that at the time, the developers of the test could not attest to its validity. While the Court could not approve the methods of selection used, because they were not yet known, the Court did not feel that the validity of the new roster was before it because the results did not show that the selection of persons for hire was done in a racial or sexual pattern significantly different than the pool of applicants.

In response to the objections of Petitioners, that this hiring plan contained no provision for them, the Court merely noted that it previously declined to impose that requirement on the City and continued to so decline.

On January 11, 1977, the United States Court of Appeals handed down its decision on the appeals from the final decree of the District Court. In that opinion, the Court found that these Petitioners had been illegally deprived of vested rights by permitting the City, at its option, to disregard the 1971 roster in making new appointments. The Court went on to hold that the Dis-

trict Court should have constructed its remedy to preserve as much of the Illinois Statutory Scheme as possible and had failed to do so when it allowed the City to depart from the 1971 roster in selecting new patrol officers. The Court further held that the 42% of white males to be hired under the decree after minorities, must be selected from the applicable eligibility rosters in rank order.

At that time, the Court of Appeals declined to rule upon the precedence of the 1971 examination vis-à-vis, subsequent examinations. Accordingly, the matter was remanded to the District Court.

Petitioners immediately filed a motion to amend the decree with the District Court requesting that the decree be amended to require that those persons remaining on the 1971 eligibility list be hired for the position of patrol officer before any white males who might appear on the 1975 eligibility list.

In further proceedings in the District Court, it was disclosed that there was no ranking of individuals in order of excellence. The architect of the examination given in 1975, admitted that he had no ability to predict whether any individual in the qualified group would make a better police officer than any individual in either of the other groups. Within each group, it made no difference in what order persons were to be hired. In his opinion, all persons within each group were fungible. There was absolutely no empirical verification that any candidate in the well-qualified group would make a better police officer than one in the qualified group. The only thing which he could say was that as a group, those listed as well-qualified had done better on the oral examination given in 1975, than those grouped as qualified. No differentiation of validation had been done on any of these groups.

It was further disclosed that the 1975 examination was merely an interim method of selecting persons for the immediate needs of the City and a one time method to obtain a pool of persons to study in order to develop a valid examination. Those hired were then to be subjected to other experimental tests after which they were to be observed and their job performance reported upon.

The plan of the City was to consider peer evaluations, rating by supervisors and ratings by judges as to the recruits' performance in Court while testifying as witnesses and evaluation of their personnel folders to validate the experimental examinations for use in the future.

As of March, 1977, 535 persons had been hired from the 1975 examination upon which these studies were being conducted. It was admitted that this group was an adequate number upon which to base a predictive validity study. Any additional results which the study group was attempting to obtain was not necessary in order to devise a valid selection examination. Any interest in obtaining these studies was for the investigator's own personal and professional use, rather than for devising a new examination for the City of Chicago.

The City of Chicago made absolutely no objection in the District Court to the motion to amend filed by these Petitioners.

On June 17, 1977, the District Court handed down its decision denying Petitioners motion to amend. That decision was based upon two premises:

> 1. To suspend hiring from the new roster or mix candidates from the 1971 roster with candidates from the new roster would require the City to close down its test development and leave it with an inadequate sample from which to demonstrate test validity.

2. Those on the 1971 eligibility roster no longer had any right or entitlement under state law to the position of patrol officer since the list was more than 2 years old and by choosing to proceed with appointments from the new roster, the City had, in effect, struck the old roster.

Petitioners appealed this decision to the United States Court of Appeals for the Seventh Circuit.

The Court of Appeals held that the Civil Service Commission of Chicago was not required to maintain the eligibility list on which Petitioners' names appeared longer than 2 years. Thus, the Civil Service Commission had the unfettered right to cancel this list.

The Court of Appeals refused to decide the Petitioners challenge to the validity of the 1975 examination under state law, since Petitioners did not have standing to challenge it in view of the fact that they no longer had any right to be hired.

REASONS FOR GRANTING THE WRIT

I.

PETITIONERS HAVE BEEN DEPRIVED OF THEIR RIGHT TO EMPLOYMENT.

Petitioners have been placed into a legal maze from which there is no possible escape. Having done everything proper and possible to obtain the position of patrol officer of the City of Chicago, they have been thwarted at every turn. They have complied with every possible requirement to qualify for that position. They have been found qualified to fill that position. Yet, the District Court has found reason after reason why they should not be hired. The Court of Appeals has refused to examine those reasons. Prior to the entry of the final decree of the District Court, no one opposed the request of these Petitioners that some plan be worked out wherein they would be hired to the position to which they aspire. No one opposed their request that they be hired in any plan devised in the future.

Only on the proceedings after remand from the Court of Appeals' first decision, did anyone voice any objections to their hiring. The only objection was filed by the Black plaintiffs who stated that since more than 2 years had passed since the posting of the 1971 list, Petitioners have no vested rights and that to hire them would interfere with the City's efforts to devise a proper valid examination in the future. Ultimately, the Court of Appeals agreed that since more than 2 years had passed since the posting of the 1971 eligibility list the Petitioners had no right to positions as patrol officers.

At no time during the entire proceedings before the District Court did the City of Chicago or the United

States ever object to the request of these intervenor defendants that they be hired. At no time did the City of Chicago even deign to explain to either the District Court or the Court of Appeals why it had decided not to hire these persons. Yet, in the face of no substantial opposition, the District Court steadfastly refused to give any consideration whatsoever to the vested rights of the Petitioners. It is clear that the District Court abused its discretion in not working out some plan wherein the vested rights would be protected.

The decision of the District Court not to require the hiring of Petitioners was based upon the premise that since they were the unknowing beneficiaries of an examination which discriminated against minorities, their interests must be subordinated to those minorities. Of course, the District Court failed to recognize that it was subordinating the interests of known persons who had acted in good faith to the group interest of persons who are unidentified, and unidentifiable. The Court of Appeals said nothing on this subject.

The ultimate decision in the case was based upon the fact that state law allows an existing Civil Service eligibility list to be withdrawn after it is more than 2 years old. Here, while the list upon which Petitioners appeared was in effect, few persons were hired to the position of patrol officer because the City was enjoined from hiring by the District Court. Indeed, the City never took down the 1971 eligibility list until after the District Court had refused to grant Petitioners motion to amend its decree, and after Petitioners had filed their appeal in the Court of Appeals from which this Petition is brought. Thus, at all times involved herein, the list upon which Petitioners appeared was valid and existing. Yet,

the District Court, in the face of protestations by the City of Chicago that the list was in effect, found that the City had in effect taken the list down by not hiring from it. This argument was never made by the City.

It is clear that in situations such as this, the District Court must exercise proper discretion in devising remedies for past discrimination. Clearly here, the District Court did not utilize that discretion. In fact, the District Court left it wholly to the City of Chicago to determine from what source it would hire personnel in the future. It made no provision whatsoever for Petitioners. To this very day, the City has never given any reason whatsoever why it has refused to hire them. The District Court has sanctioned that refusal without any inquiry whatsoever into that decision. Clearly, it cannot be said that the District Court has utilized its discretion when it has not obtained information upon which to base that discretion. Leaving the decision to the City, with no limits or guidelines of any kind, is clearly improper. This is particularly so when the City has been found to violate the rights of others as was found in this case.

Fairness and equity cries out for the hiring of Petitioners. They have been waiting 7 years to know whether or not they will be hired. No one has ever, during this entire period of time, given any reason whatsoever why they should not be hired. The most that has been said is that they have no right to the positions, and therefore, ought not to be given any consideration. Clearly, when the Courts step into a situation such as this, they must do equity for all. Petitioners have never requested that they be placed in a position superior to anyone else. All they have asked is that they be hired

prior to those other white males who have applied for the position subsequent to them. This will not interfere in the Court's attempt to remedy the past discrimination by the City of Chicago. Nor has anyone ever indicated that to hire them will interfere with that goal.

The most that has been said is that to hire these people will interfere with the attempts of the City to devise a new examination. Yet, Dr. Guion, the individual in charge of devising the new examination has made it clear that those already hired are a sufficient group upon which to do his validation studies and devise a new examination in the future.

Dr. Guion testified that his commitment to study the performance of recruits of the Chicago Police Department expired with the class hired in October, 1977. Even then, the results of his examination will not be ready until late in 1979. Absolutely no reason has been advanced why Petitioners cannot be hired subsequent to that time. No reason whatsoever has been given which would prohibit their hiring. At the very least, the District Court should have considered that they would be hired as of the class succeeding the October, 1977, class. Yet, the District Court was entirely silent on this aspect of the matter. In fact, the District Court, rather than exercising its discretion, abdicated that discretion to the City of Chicago. At no time has the City ever given any reason for its decision not to hire the Petitioners.

Other District Courts have devised proper plans in situations such as the instant one. In *Bridgeport Guardians v. Members of the Bridgeport Civil Service*, 482 F. 2d 1333 (2d Cir. 1973), the District Court set quotas for hiring minorities in order to correct past racial imbalance. In its decree, the Court had provided that the

existing eligibility list would remain valid insofar as white males were concerned for use in filling future positions. No such approach was taken here, although to do so would have harmed no one. Similarly, in *Western Addition Community Organization v. Alioto*, 360 F. Supp. 733 (N.D. Cal. 1973), the District Court retained the use of the existing Civil Service list for the filling of positions, while enjoining the use of a written examination which was found to discriminate against minorities.

In *Boston N.A.A.C.P. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), the District Court took a slightly different tact in attempting to correct racial imbalance as a result of discriminatory testing. There, the Court set up 4 categories to be used in future hiring:

> A. All black and spanish-surnamed persons who had failed the previous discriminatory test, but who had passed a new valid test.
>
> B. All persons on the existing eligibility list.
>
> C. All black and spanish-surnamed persons who had not taken the prior invalid test, but who had taken and passed the new valid test.
>
> D. All other persons passing the new valid test.

The Court then ordered that as vacancies arose, initial preference was to be given to those in categories A and B, on a one-to-one basis, until the lists were exhausted. The other groups were then to be drawn upon as categories A and B were exhausted. This decree was approved by the Court of Appeals.

Each one of these plans were designed to give some measure of reasonable protection to those who had taken and passed examinations, even though those examinations were ultimately found to be discriminatory and for that reason at least partially invalid. It is sub-

mitted that the same approach should have been taken here, and that the failure to even consider doing so was an abuse of discretion.

At the very least, those white males on the 1971 list ought to have been given priority over white males on the 1975 list, for those positions which occurred prior to the giving of the 1975 examination. They were the only persons declared qualified for those positions at the time they became vacant. Under the laws of the State of Illinois, whenever a position becomes vacant, the Civil Service Commission is to certify the name and address of the candidate standing highest on the register for that position at that time. The position is then required to be filled by that candidate. Chapter 24, Ill. Rev. Stats., § 10-1-14. Even conceding the preference to be given to minorities to alleviate past discrimination, there is no reason for depriving those white males on the 1971 list who have obtained the right under Illinois law to those other vacant positions which became available while they were on the one and only eligible list in existence at the time.

As of the time of the vacancy of the position, those on the eligible list became absolutely entitled to those positions. The granting of the extraordinary relief found to be necessary in this case to correct past discrimination against minorities does not justify depriving those on the 1971 list of their right to the remaining positions. Indeed, such a procedure is specifically prohibited by the language of the Illinois Civil Service statutes. To completely ignore the remainder of the 1971 list after the minorities on it have been exhausted serves no useful purpose. It does not promote the cause of racial equality of employment, either as embodied in the constitution or the statutes. What it does do is to substitute one group of

persons for another standing in substantially the same position in direct violation of the Illinois Civil Service laws and common sense.

To allow the abolition of the 1971 list, and the destruction of the rights of those who have obtained places upon it, also violates all common sense. Had the District Court not enjoined hiring, they would have been hired. The Court has deprived them of their rights to be hired, while taking no steps whatsoever to give them any consideration. Absolutely no reason was given to support such actions. Yet, Petitioners have been deprived of any consideration whatsoever. To allow such a situation to occur, clearly does violence to fairness and equity. It surely promotes disrespect for the law.

Some attention should have been paid to Petitioners. They cannot be cast aside like a suit of old clothes. They were caught up in a situation not of their making. To completely ignore them and ignore their rights is to compound injustice at the hands of the Courts.

CONCLUSION

All that Petitioners ever asked is that they not be completely ignored. All they request is that they be given due consideration and be worked into a viable plan for hiring to the position for which they were examined and told by the City of Chicago they were qualified to fill. They are all individuals with legitimate expectations. Such individuals and expectations must not be sacrificed to abstract principles and impersonal

social engineering. To do so, is to lose sight of basic humanity and the worth of the individual. That must not occur.

Wherefore, Petitioners pray that this Court's Writ of Certiorari issue and that the judgment below be reversed and that the cause be remanded to the District Court with directions to devise a plan wherein Petitioners, those on the 1971 Patrolman's Eligibility List be hired to that position.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 76-2044 and 77-1681 (Consolidated)

UNITED STATES OF AMERICA, et al.,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO, et al.,

Defendants-Appellees,

and

ROY ISAKSON, et al.,

Intervening Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 73 C 2080, 70 C 2220, 73 C 1252 and 75 C 79.
Prentice H. Marshall, *Judge.*

ARGUED OCTOBER 28, 1977—DECIDED DECEMBER 14, 1977

Before SPRECHER, *Circuit Judge,* COWEN, *Senior Judge,** and WOOD, *Circuit Judge.*

SPRECHER, *Circuit Judge.* This case involves the consolidated appeals of two related aspects of a civil rights action broadly challenging the employment practices of

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* Senior Judge Wilson Cowen, of the United States Court of Claims, is sitting by designation.

the Chicago Police Department. Most aspects of the case have been settled by prior litigation in the federal courts.[1] The issue presented in this appeal involves the rights under Illinois state law of those white males remaining on the patrolman eligibility roster posted in 1972 to be appointed by the Chicago Police Department to enter the Police Academy.

I

On December 4, 1971, the Civil Service Commission of the City of Chicago administered an examination for the position of patrolman of the City of Chicago. An eligibility list was posted on July 19, 1972,[2] and hiring was begun. On August 14, 1973, the United States filed suit attacking this examination on the basis that it discriminated against minorities in violation of Title VII of the Civil Rights Act of 1964. The district court granted plaintiffs' motion for a preliminary injunction on November 7, 1974, enjoining the city from appointing any further personnel to the rank of patrolman for the City of Chicago from the eligibility list based on the 1971 examination until further order of the court. *United States v. City of Chicago*, 385 F. Supp. 543 (N.D. Ill. 1974).

On December 16, 1974, the district court entered an interim hiring order under which 600 persons (including 300 minority males and 100 females) would be appointed. Upon fulfillment of this order, all minorities from the 1971 list were hired and only white males remained. The district court on February 28, 1975, granted leave to intervene as parties defendant to representatives of those white males who had been placed

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[1] For a summary of the facts, see *United States v. City of Chicago*, 395 F. Supp. 329 (N.D. Ill. 1975). For a concise history of the prior litigation see *United States v. City of Chicago*, 534 F.2d 708 (7th Cir. 1976). This court's decision on the merits can be found in *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977).

[2] Appendix B to the Interim Hiring Order of December 16, 1974.

on the eligibility list in 1972 but had not yet been appointed (Isakson intervenors).

On January 5, 1976, the district court entered its final memorandum decision on the merits and its final decree and supplemental memorandum was entered on February 2, 1976. *United States v. City of Chicago*, 411 F. Supp. 218 (N.D. Ill. 1976). The district court found that the 1971 patrolman examination had a grossly disproportionate impact on minorities and ordered the city to hire persons with respect to mandatory hiring quotas. So long as these quotas were maintained and the interim hiring order was completed, the district court nevertheless allowed, but did not require, the City to make use of the remaining names on the 1971 list in subsequent hiring. 411 F. Supp. at 249.

On appeal this court vacated that portion of the decree which would allow the City to ignore the 1971 patrolman roster and remanded with the requirement that the district court should preserve as much of the Illinois statutory scheme as possible. *United States v. City of Chicago*, 549 F.2d 415, 437-38 (7th Cir. 1977). This court declined to decide whether persons on the 1971 roster must be hired prior to any other persons in light of the difficult problems of state law that might arise in such a determination.

In the meantime the City had devised a new examination which it administered on April 19, 1975. In February, 1976, the City produced a group of rosters based on the 1975 examination. The district court received comments and objections regarding the use of the 1975 examination and its results and on September 7, 1976, the court overruled these objections and approved the use of the 1975 eligibility list because it did not have an impermissible discriminatory effect. *United States v. City of Chicago*, 420 F. Supp. 733 (N.D. Ill. 1976). Since the test was new and a determination of its overall validity could not be made, the district court felt that this question need not be reviewed in light of the test's failure to produce discriminatory results. Finally, the district court once again refused to require the City

to utilize the remainder of the 1971 eligibility list before appointing persons from the new roster. The Isakson intervenors appeal from that determination.

The district court, on remand from the decision of this court on the merits, once again ruled adversely to intervenors and denied intervenors' motion to amend the decree to require "that those persons remaining on the 1971 eligibility list be hired for the position of patrol officers before white males from the 1975 eligibility examination." *United States v. City of Chicago*, 437 F. Supp. 256 (N.D. Ill. 1977). The court held first that the 1975 examination and resulting eligibility roster was valid under both federal and Illinois state law. Second, the court concluded that the intervenors had no claim to appointment since the 1971 list had been posted for two years and, under Illinois state law, entrance level rosters may be removed after two years even though vacancies may exist unfilled. The court viewed the use of the 1975 roster by the City as a de facto striking of the 1971 roster and refused to enjoin the city from doing so. The city subsequently struck the list (Intervenors Brief p. 19 and Intervenors Reply Brief p. 2). Intervenors appeal from the 1977 decision of the district court and this appeal was consolidated with their earlier appeal from the September 7, 1976, ruling of the district court. Our jurisdiction derives from 28 U.S.C. § 1291.

II

We address first the issue of intervenors' right to be hired under Illinois state law irrespective of the validity of the 1975 examination and its results. It is clear that intervenors took the 1971 examination in good faith, passed it, and their names were placed on an eligibility list on July 19, 1972, in accordance with Illinois law. ILL. REV. STAT. ch. 24, §§ 10-1-7, 10-1-12. The City of Chicago hired some persons from this list. On November 7, 1974, the City was enjoined from making further appointments from the list by the district court although some persons on the list were subsequently hired pursuant to the Interim Hiring Order of the district court. On February 2, 1976, the district court gave permission

to the City once again to utilize the 1971 list for hiring purposes. Finally, after the district court refused on June 17, 1977, to enjoin the City from striking the 1971 roster, the City issued an order taking the list down and no further appointments were made therefrom.

Intervenors claim that they have been denied vested rights under Illinois law. Their right to be considered for entrance level positions exists as long as the eligibility list upon which intervenors' names appear remains posted.[3] The civil service commission, however, is not required to maintain an eligibility list until all those listed on it have been appointed. ILL. REV. STAT. ch. 24, § 10-1-14 provides, in part, that "[t]he commission may strike off names of candidates from the register after they have remained thereon more than two years." This statute does not provide any limitation on the commission's authority to strike an entrance level roster.[4]

It is undenied that the roster in issue here was posted for two years before the commission struck it. Indeed, the list was posted for two years prior to the district court injunction prohibiting its further use.[5] The Illinois

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[3] The characterization of the nature of intervenors' "rights" is not of crucial importance since intervenors do not claim that the actions of the district court violated the Due Process Clause of the Fourteenth Amendment. We note, however, that Illinois courts have considered such rights to be political in character and involving no property right. *Butts v. Civil Service Commission of City of Aurora*, 108 Ill. App.2d 258, 246 N.E.2d 853 (1969); *People ex rel. Hawkonsen v. Conlisk*, 119 Ill. App.2d 431, 256 N.E.2d 99 (1970); *People ex rel. Baker v. Wilson*, 39 Ill. App.2d 443, 189 N.E.2d 1 (1963); *Baldwin v. Hurley*, 9 Ill. App.2d 532, 133 N.E.2d 522 (1956).

[4] In comparison, a limitation does exist regarding the striking of a *promotional* roster in that it may be removed after two years only if all existing vacancies are filled prior to cancellation. ILL. REV. STAT. ch. 24, § 10-1-13.

[5] The list was posted on July 19, 1972, and the district court injunction was entered on November 7, 1974. Since a two-year period elapsed prior to entry of the injunction, we need not address the question of the propriety of striking a list which, although posted for a period of two years, was enjoined from use before that period accrued, or whether such an injunction might serve to toll the two-year period.

courts have been consistent in upholding "the undoubted right to strike from an eligibility list all names appearing thereon for a period of more than two years." *Baldwin v. Hurley*, 9 Ill. App.2d 532, 534, 133 N.E.2d 522 (1956); *People ex rel. Hawkonsen v. Conlisk*, 119 Ill. App.2d 431, 256 N.E.2d 99 (1970); *People ex rel. Lynch v. City of Chicago*, 271 Ill. App. 360 (1934); *People ex rel. Walsh v. City of Chicago*, 226 Ill. App. 409 (1922). This right has been upheld even where the list has been cancelled after suit was instituted to prevent cancellation or to compel appointment from a roster. *People ex rel. Baker v. Wilson*, 39 Ill. App.2d 443, 189 N.E.2d 1 (1963); *Baldwin v. Hurley, supra.*

The underlying reason for allowing the civil service commission to have wide discretion to determine whether an eligibility list should be cancelled was explained in *People ex rel. Erickson v. Sheehan*, 24 Ill. App.2d 43, 47, 163 N.E.2d 834, 836 (1960):

> The policy behind this provision is to maintain an up-to-date register, the vitality of which may be guaranteed by the discretion placed in the commission to meet changing conditions and circumstances. Toward that end, the commission is authorized to strike a register which is no longer suitable to fulfill the function for which it was intended.

Here, the list involved is more than five years old, thereby raising some questions as to its validity in providing appropriate persons for patrolman duty.

While we are not unmindful of the plight of intervenors as a result of the federal court litigation involved in this case, we cannot say that the commission abused its authority in cancelling the July 19, 1972, eligibility roster. Nor can we say the district court abused its discretion in refusing to require the City of Chicago to hire those remaining on the list or by refusing to enjoin the City from cancelling the list. We therefore conclude that intervenors' claims to be hired under Illinois law have been extinguished by cancellation of the eligibility roster posted in 1972.

III

The district court also held that the 1975 examination procedures and results were valid under federal and state law. The district court concluded that inasmuch as the 1975 examination was valid, the City, by its use of the 1975 roster, had, "in effect, struck the old rosters." *United States v. City of Chicago*, 437 F. Supp. 256, 258 (N.D. Ill. 1977). In light of our holding on the issue of cancellation under the Illinois two-year statute of the eligibility list on which intervenors' names appeared, we do not believe that it is necessary or appropriate for us to rule on the validity of the 1975 examination under Illinois state law. Even if the 1975 examination was declared invalid, intervenors would have no claim to appointment by the civil service commission. Under these circumstances, we conclude that intervenors fail to allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Reich v. City of Freeport*, 527 F.2d 666 (7th Cir. 1975).[6]

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[6] In order to challenge the 1975 examination and procedures, a person probably would have to claim that he or she took the test and was denied a place on the resulting eligibility roster because of the failure of the examination and procedures to conform to Illinois law. We note that intervenors make no claim that the civil service commission did not fulfill the notice requirements of ILL. REV. STAT. ch. 24, § 10-1-12 in administering the 1975 examination so as to apprise intervenors of the option of taking the test. In any case, questions regarding the propriety of the 1975 examination under the Illinois state law should be addressed in the first instance to the courts of the State of Illinois.

Accordingly, the decisions of the district court of September 7, 1976 and June 17, 1977, refusing to require the City of Chicago to hire those remaining on the eligibility roster resulting from the 1971 examination and refusing to enjoin the civil service commission from cancelling that roster are

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 2080
UNITED STATES OF AMERICA,
Plaintiff.

v.

CITY OF CHICAGO, et al.,
Defendants.

No. 70 C 2220
RENAULT ROBINSON, et al.,
Plaintiffs,

v.

JAMES B. CONLISK, JR., et al.,
Defendants.

No. 73 C 1252
TADEO ROBERT CAMACHO, et al.,
Plaintiffs.

v.

JAMES B. CONLISK, JR., et al.,
Defendants.

No. 75 C 79
RENAULT ROBINSON, et al.,
Plaintiffs.

v.

WILLIAM E. SIMON, et al.,
Defendants.

MEMORANDUM DECISION ON REMAND

When the final decree of February 2, 1976 was entered in these consolidated actions, the City of Chicago had not completed the development of its new methods for selecting police officers. Accordingly, subject to prescribed hiring ratios, we authorized the City, *at its election*, to continue to appoint officers from the eligibility lists based upon the invalid 1971 Patrolman's Examination and the 1972 Policewoman's/Matron's Examination. Final Decree, I, 8(b), 411 F.Supp. at 249.

On appeal from that portion of the decree which granted the City the election to use the 1971 and 1972 lists, the Isakson intervening defendants, who hold places on the 1971 patrolman's eligibility list, urged that we had "illegally deprived them of vested rights by permitting the City, at its option, to disregard the 1971 roster in making new appointments. . . ." The Court of Appeals agreed and vacated the election aspect of the decree. *United States of America, et al. v. City of Chicago, et al.*, 549 F.2d 415, 437 (1977).

In reaching its conclusion the Court of Appeals noted that subsequent to the entry of the final decree, the City had developed a police officer roster based upon the new methods of selection. Accordingly, it "decline[d] to rule on the precedence of the 1971 examination vis-à-vis subsequent examinations" concluding that it would be "inappropriate for [it] . . . to decide the difficult issues of state law that may arise in determining the rights of persons on the 1971 roster in light of the existence of a new roster derived from the 1975 examination" and "limit[ed] [its] holding . . . to the statement that the City must utilize the results of some examination given pursuant to the Illinois law in appointing patrol officers." 549 F.2d at 438.

There are now pending on remand the motions of the Isakson intervening defendants and the Burauer intervening plaintiffs, who hold places on the 1972 Policewoman's/Matron's list, to compel the City to hire

white males from the 1971 list and females from the 1972 list. For the reasons hereinafter stated, the motions are denied.

We have already expressed our approval of the nondiscriminatory results which the new methods of selection have produced. As a consequence of those results we have, for the present, suspended the hiring ratios which were prescribed in the final decree. 420 F.Supp. 733. Virtually all of the impounded revenue sharing funds have been released and the balance shortly will be. The City has acquiesced in the judgments of this court and the Court of Appeals and is now well along the road toward the development of nondiscriminatory methods of selecting police officers.

These methods of selection have been developed under the guidance of Professor Robert Guion of Bowling Green University who testified at an evidentiary hearing held on the pending motions, that the new roster provides sample populations by which the City may satisfy the guidelines of Title VII for validated test procedures. He has also testified that to suspend hiring from the new roster or mix candidates from the 1971 and 1972 rosters with candidates from the new roster would require him to close down his test development program and leave him with an inadequate sample from which to demonstrate test validity, especially on a differential basis. EEOC Guidelines require proof of the differential validity. 29 C.F.R. § 1607.5(b)(5). And, according to Professor Guion, differential validity comparisons will enable the City to select the most valid, least discriminatory battery of selection devices for future use. Therefore, we conclude that it is preferable that the City be permitted to proceed along the path it is pursuing.

Nor do the new methods of selection contravene Illinois law. The beginning point is a written examination. It tests the candidate's ability to read the written materials used in the Police Academy and his or her perceptual skills, i.e., the ability to make detailed observations which is the most salient single characteristic of

a patrol officer's job. The candidates either pass or fail the written examination.

Those who pass proceed to oral interviews before a three member board which includes two police officers and one person from the Department of Personnel. Here the candidate is asked a series of questions designed to ascertain his or her attitude toward police work. On the basis of the oral interviews, the candidates are classified well qualified, qualified and not qualified. The latter are dropped; the first two groups proceed to comprise the selection roster with the well qualified selected first on a random basis, to be followed by the qualified when the supply of well qualified is exhausted.

On the same day as the oral interview, but not as a present means of selection, the candidate is also given a battery of research tests concerned with personality, leadership and stability. The purpose of these tests is to develop even better methods of selection for future rosters.

We conclude that the new methods of selection are valid under Illinois law. They are competitive, "practical in their character" and "relate to those matters which . . . fairly test the relative capacity of the person examined to discharge the duties of the positions to which they seek to be appointed. . . ." *Ill. Rev. Stat.* 1975, ch. 24, § 10-1-7.

There remains the question whether the Isakson and Burauer groups have a right to be hired from the 1971 and 1972 lists despite the existence of a valid new roster.

Illinois law provides that a civil service commission "may strike off names of candidates from the register after they have remained thereon for two years." *Ill. Rev. Stat.* 1975, ch. 24, § 10-1-14. Unlike promotional lists, entrance level rosters may be taken down after two years even though existing vacancies may not yet have been filled. Compare § 10-1-14 with § 10-1-13; *see, e.g., Baker v. Wilson*, 39 Ill.App.2d 443, 189 N.E.2d 1 (1963); *People v. Chicago*, 226 Ill.App. 409 (1922) Persons still

listed on the 1971 roster no longer have any right or entitlement under state law to be offered patrol officer positions since that list is much more than two years old. By choosing to proceed with appointments from the new roster, the City has, in effect, struck the old rosters. It should not be enjoined from doing so.

The motions of the Isakson intervening defendants and the Buraurer intervening plaintiffs to compel their selection from the 1971 and 1972 rosters is denied. The City of Chicago is directed to submit to the court on June 21, 1977 at 9:00 a.m., the group of candidates next to be called to the Police Training Academy from the 1975 roster. The court finds pursuant to Rule 54(b) *Fed. R. Civ. P.*, that there is no just reason for delay in the entry of this order as a final judgment on these issues and directs the Clerk to enter a final judgment accordingly.

Enter:

/s/ PRENTICE H. MARSHALL
Judge

Dated: June 17, 1977.

No. 77-1330

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROY ISAKSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

DREW S. DAYS, III,
Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were improperly denied employment as patrolmen with the Chicago Police Department.

1. In December 1971, the City of Chicago gave a competitive examination for the position of patrolman in the Chicago Police Department. Petitioners, a group of white candidates who had passed the examination, were awaiting possible appointment as patrolmen when the United States filed suit against the City in the United States District Court for the Northern District of Illinois. The United States alleged, *inter alia,* that the examination discriminated against minority persons, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. (and Supp. V) 2000e *et seq.* (Pet. App. 2a).

In November 1974, the district court found the 1971 examination discriminatory and enjoined the City from making any further appointments from the roster compiled on the basis of the results of that examination. 385 F. Supp. 543. The court subsequently permitted hiring from the 1971 roster if certain numbers of minority persons were appointed at the same time. Petitioners then intervened in the suit (Pet. App. 2a-3a).

In its final judgment, the district court found that the 1971 examination had a grossly disproportionate impact on minority persons and was not validated as job-related. As a remedy, the court ordered the City to meet certain goals with respect to minority hiring. 411 F. Supp. 218. The court permitted, but did not require, the City to continue hiring from the 1971 roster (Pet. App. 3a).

The court of appeals affirmed the final decree in all respects but one. 549 F. 2d 415. It vacated the portion of the final decree that permitted the City to ignore the roster compiled from the 1971 examination and directed the district court to preserve as much of the state statutory hiring scheme as possible by ensuring that the City utilize the results of some examinations given pursuant to Illinois law in appointing patrolmen. 549 F. 2d at 438.

On remand, the district court noted that in 1975 the City had given a new examination and had compiled a new eligibility roster based on that examination. The district court found that the 1975 eligibility list was non-discriminatory and was valid under both state and federal law (Pet. App. 11a-12a). The court further observed that, by choosing to make appointments from the 1975 roster, the City had in effect struck the 1971 list, a practice

permitted by state law (Pet. App. 12a-13a).[1] Accordingly, the court concluded that petitioners had no right under state law to be appointed patrolmen.

The court of appeals affirmed in an opinion on which we rely (Pet. App. 1a-8a). The court held that the City had acted within its authority under state law in cancelling the eligibility roster based on the 1971 examination (*id.* at 6a) and that this action extinguished any claims petitioners had by virtue of having been on that roster.

2. Petitioners' contention (Pet. 11-12) that they have improperly been denied "vested rights" under state law[2] is incorrect. As the court of appeals found (Pet. App. 5a-6a), the City's action in cancelling the 1971 roster, even though not all persons on it had been appointed, was in conformity with applicable state law. Petitioners do not challenge this conclusion.

Moreover, petitioners concede (Pet. 13) that the district court was required to exercise its discretion in devising remedies for past discrimination. The district court properly exercised that discretion, while adhering to the mandate of the court of appeals, by approving a hiring scheme that utilized the results of an examination given in accordance with state law. Since state law specifically provided for the City to substitute a new roster for one based on a test given more than two years before, the district court's order approving the City's action did not deprive petitioners of any "vested" legal rights.

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[1]The City formally struck the 1971 list after the district court entered its order (Pet. App. 4a).

[2]As the court of appeals noted (Pet. App. 5a n. 3), petitioners' property right claims are based solely on state law.

It is therefore respectfully submitted that the petit for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

DREW S. DAYS, III,
Assistant Attorney Gene

MAY 1978.

DOJ-1978-05